

Note from the Field

Flying Evaluation Boards: A Primer for Judge Advocates

*Captain Michael P. Ryan
Regiment Judge Advocate
160th Special Operations Aviation Regiment (Airborne)
Fort Campbell, Kentucky*

Introduction

Army regulations provide that “[e]ach officer authorized to pilot a military aircraft or to perform crew member duties must maintain the highest professional standards. When an officer’s performance is doubtful, justification for continued aviation service or authorization to pilot Army aircraft is subject to complete review.”¹ The forum for this review is a flying evaluation board (FEB).

Judge advocates who support aviation units will, at some point during their tenure, likely participate in an FEB. At first glance, such a proceeding may seem the province of pilots, rather than attorneys. After all, the purpose of the board is to evaluate a pilot’s potential for continued aviation service. What could a non-aviator judge advocate have to offer?

The answer to this question can be summed up in one word: counsel. Like all formal boards in the military, the FEB includes a government representative or “recorder,” and, because the aviator is designated as the “respondent,” he is entitled to counsel.² Accordingly, judge advocates should be aware that they may be called on to play a part in an FEB, at any given time.

Judge advocates who are unfamiliar with Army aviation should not be alarmed at the prospect of participating in an FEB. With a little bit of homework and a careful review of the relevant regulations, most attorneys will find that an FEB is no more difficult than any other administrative board. The key is to consult with subject matter experts early in the process to

gain a basic understanding of the aviation specific issues that the board will consider.

Reasons to Convene a FEB

An FEB may be convened for a variety of reasons. In most cases, it will be directed when an aviation officer fails to maintain professional or medical qualifications or an officer demonstrates behavior that could be construed as substandard or unsafe.³ Examples of unsafe behavior include: flagrant violations of flying regulations, failure to comply with urinalysis testing, positive urinalysis results, insufficient motivation, or unsatisfactory duty performance.⁴

In some cases, an FEB will be convened in the wake of an aircraft accident. If a collateral investigation was conducted to investigate the accident, records and information that were collected during the collateral investigation may be made available to the FEB.⁵ Reports and information compiled by the Army Safety Center or a formal accident investigation board are not releasable to the FEB.⁶

As with other adverse actions, the government has the burden of proof. Specifically, the government must prove that the aviator’s qualifications have lapsed or that his behavior is substandard or unsafe. Unless otherwise directed by the appointing authority, the standard of proof for an FEB is the “greater weight of evidence” standard, as outlined in *Army Regulation (AR) 15-6*.⁷ Under normal circumstances, an FEB should not disqualify an individual from aviation service “based on an iso-

1. U.S. DEP’T OF ARMY, REG. 600-105, AVIATION SERVICE OF RATED ARMY OFFICERS, para. 6-1 (15 Dec. 1994) [hereinafter AR 600-105].
2. See U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, ch. 5 (11 May 1988) [hereinafter AR 15-6] (discussing rules governing entitlements to counsel during formal boards of officers).
3. AR 600-105, *supra* note 1, para. 6-1c.
4. *Id.* para. 6-1.
5. See U.S. DEP’T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS (1 Nov. 1994).
6. *Id.* para. 1-10 (containing detailed information on aircraft investigations).
7. AR 15-6, *supra* note 2, para. 3-9b (stating that findings of investigations and boards governed by this regulation must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more probable than any other conclusion).

lated incident or action.”⁸ Rather, the government must show a pattern of dangerous or unacceptable performance.

The Applicable Regulations

In preparing for an FEB, a judge advocate must carefully review *AR 600-15*, chapter 6. This portion of the regulation discusses the FEB in detail, including the review and approval process for the board’s findings and recommendations.

Since an FEB is a formal board of officers, *AR 15-6*, should be used as a procedural guide. Judge advocates should read *AR 15-6*, chapter 4 along with *AR 600-105*, paragraph 6-3 for detailed information on procedures for formal boards. The script and the sample appointment and notification memoranda found in *AR 15-6* are appropriate for use before and during the FEB.⁹ In rare instances when there is a conflict between *AR 600-105* and *AR 15-6*, “the guidance found in *AR 600-105* will prevail.”¹⁰

FEB Procedures

An FEB may be appointed by any officer with the authority to suspend an aviator from flight status for up to 180 days.¹¹ For active duty forces, this includes commanders of “posts, camps, stations, divisions, regiments, brigades, or detached battalions.”¹² Under most circumstances, the FEB appointing authority is a brigade level commander. The appointing authority typically appoints board members and the respondent by a signed memorandum. Upon completion of the board, the memorandum will be attached as an enclosure to the FEB report.

An FEB will be composed of an uneven number of voting members (no fewer than three) who are aviation rated commissioned and warrant officers. If the respondent is a warrant officer, at least one non-voting member will be a warrant officer who is senior in grade to the respondent.¹³ If a medical issue is involved, the board may include a flight surgeon as a non-voting member. In all other respects, board membership will comport with *AR 15-6*, to include the appointment of a non-voting legal advisor.

Procedures for conducting the board are contained in both *AR 15-6* and *AR 600-105*.¹⁴ In general, the board receives exhibits and hears testimony from the government and the respondent. Witnesses for both sides are subject to direct and cross-examination and, as with other military forums, the board members may question the witnesses if they so desire. Formal rules of evidence do not apply, and the president of the FEB rules on all objections. The respondent has a right to be represented by military counsel free of charge or by civilian counsel at no expense to the government.

Findings and Recommendations

After deliberation, the FEB will issue its findings and recommendations. There is no restriction regarding the content of the board’s findings; however, *AR 600-105* states that the *recommendations* of an FEB are generally limited to:

- (1) Officers with proper training and skills be awarded an aeronautical rating.
- (2) Orders suspending the respondent from flying be rescinded and the respondent be restored to aviation service.
- (3) Orders disqualifying the respondent be rescinded and the respondent be requalified for aviation service.
- (4) The respondent be disqualified from aviation service.
- (5) The respondent be permanently disqualified from aviation service.
- (6) The respondent be permanently disqualified from aviation service and no longer authorized to wear the Army Aviation Badge.¹⁵

In cases where aviation operations or the flying ability of the respondent can be improved, other recommendations can be made.¹⁶ Judges advocates should carefully review the options available to the FEB regarding possible recommendations and craft the theory and theme of their cases accordingly.

8. *AR 600-105*, *supra* note 1, para. 6-3d(1).

9. *AR 15-6*, *supra* note 2, figs. 2-1, 2-2, 3-1.

10. *AR 600-105*, *supra* note 1, para. 6-1d.

11. *Id.* para. 6-1b.

12. *Id.* ch. 5, tbl. 5-1.

13. *Id.* para. 6-2.

14. See generally *AR 15-6*, *supra* note 2, ch. 3; *AR 600-105*, *supra* note 1, para. 6-3.

15. *AR 600-105*, *supra* note 1, para. 6-3c.

Review, Appeal, and Requalification

The appointing authority (or a higher reviewing authority) may take final action on the board's recommendations when such action restores the aviator to aviation service, provided that the aviator has not previously been disqualified.¹⁷ If the board results are adverse to the aviator, they must be forwarded through command channels to the next higher reviewing authority. In all cases, the commander in the aviator's chain of command who exercises general court-martial convening authority will approve the FEB report.¹⁸

Adverse FEB results may be appealed based on additional evidence or new, unexpected circumstances. Aviators grounded by a previous FEB, who were not permanently disqualified from aviation service, may seek requalification "when the original reason(s) for the disqualification and current circumstances warrant reconsideration."¹⁹ In cases where an aviator requests requalification, the FEB is not bound by the decisions of the first board. Approval authority for requalification parallels aviation service termination authority. For Aviation Branch, Medical Service Corps, and warrant officers the approval authority is the Commander of Personnel Command. For Medical Corps officers (flight surgeons), the approval authority is the Surgeon General, U.S. Army.

Practice Notes

By its very nature, the FEB involves a variety of issues that are unique to Army aviation. It is imperative, therefore, that non-aviator judge advocates (recorder, defense counsel, and legal advisor) consult with a subject matter expert, preferably a rated Army aviator, well in advance of the board. An aviation officer will be able to walk judge advocates through the respondent's flight records (normally an important exhibit for the board to consider) and to clarify other matters involving flying

proficiency, aeronautical ratings, currency requirements, and medical fitness to fly.

If the respondent is facing disqualification for medical reasons, judge advocates should prepare for the board by interviewing a qualified and current flight surgeon. Depending on the situation, the recorder or defense counsel may want to call a flight surgeon as a witness. Likewise, if the aviator's mental state is at issue, a military psychologist, particularly one who has attended the Aeromedical Aviation Psychology Course, may be a critical witness.

One final practice note involves the use of acronyms during the board. Like every branch of the Army, Aviation has its own unique terminology and acronyms. Since there will likely be no verbatim record taken during the FEB, the reporter will have to prepare a summary of the proceedings from an audiotape. Judge advocates should be alert to the use of acronyms by witnesses and board members and ensure that the acronyms are clarified on the spot. This will greatly assist the reporter in preparing a timely summary of the proceedings.

Conclusion

"The objective of the FEB is to ensure that all information relevant to an aviator's qualifications is presented, and that the proceedings are objectively evaluated."²⁰ To help the board meet this objective, judge advocates must consult early and often with subject matter experts. They must gain a basic understanding of aviation terminology and aviation specific issues. As with any military proceeding, a judge advocate's credibility during an FEB will be based, in large part, on his knowledge of the subject matter and his ability to "speak the language" of the board members.

16. *Id.*

17. *Id.* para. 6-3f.

18. *Id.*

19. *Id.* para. 6-6a.

20. *Id.* para. 6-3.